82-1330

No.

In the Supreme Court of the United States

October Term, 1982

MORRIS THIGPEN, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

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vs.

BARRY JOE ROBERTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on November 16, 1982.

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the appendix, *infra*, p. A1 to p. A6. The opinion of the United States Court of Appeals for the Fifth Circuit which is unreported, is set out in the appendix, *infra*, p. A7.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982 (App., *infra*, p. A7). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent was indicted, tried and convicted of manslaughter by means of culpable negligence in the Circuit Court of Tallahatchie County, Mississippi. Respondent was sentenced to serve twenty (20) years in the custody of the Mississippi Department of Corrections.

Respondent's trial and conviction on the manslaughter charge resulted from a tragic collision on August 6, 1977, between an automobile driven by Respondent and a pickup truck, in which collision a ten-year-old child was killed. Shortly after the accident, Respondent was cited by a Mississippi Highway Patrolman for driving under the influence, driving on the wrong side of the road, driving with a suspended license, and reckless driving. On August 13, 1977, Respondent was tried and convicted on these charges by a Tallahatchie County Justice Court Judge; on the same date, Respondent appealed the convictions to the Circuit Court of Tallahatchie County pursuant to Miss. Code Ann. § 99-35-1. Before the misdemeanor charges

were retired on appeal, Respondent was indicted by the Tallahatchie County Grand Jury for manslaughter of the child killed in the traffic collision. Trial of the Respondent on the misdemeanors thereafter was consolidated with trial of the manslaughter charge, but the misdemeanor appeals were nolle prossed during the consolidated trial.

On or about March 13, 1981, Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Mississippi. Respondent assigned as grounds for relief the following:

1. The trial court erred in permitting the petitioner to be indicted and tried upon a set of facts and circumstances which formed the basis for previous justice court charges for which the petitioner had been tried, convicted, and sentenced.

2. The trial court erred in vacating its order denying petitioner a special venire and later during the trial declaring that a special venire had in fact been given and petitioner's trial attorney was negligent in not objecting to same.

3. The trial court erred in permitting the State to consolidate the misdemeanor appeals and to receive evidence relating to same during trial of the related felony count and petitioner's trial attorney was grossly negligent in not objecting to same.

4. The legal representation of the petitioner at the trial level and at the initial appellant submission was grossly incompetent and prejudicially negligent and entitles the petitioner to a new trial.

On April 20, 1981, Petitioners filed their Answer denying that Respondent was entitled to any habeas corpus relief.

On November 3, 1981, the Magistrate filed his Report and Recommendation recommending that Respondent be granted habeas relief.

On December 8, 1981, Petitioners filed their Objections to the Magistrate's Report and Recommendation.

On January 18, 1982, Judge L. T. Senter, Jr., United States District Judge for the Northern District of Mississippi filed his Order granting Respondent habeas corpus relief and adopting the Magistrate's Report and Recommendation.

On March 30, 1982, Petitioners filed their brief in the Fifth Circuit Court of Appeals and Argument was had in August, 1982.

The Court of Appeals affirmed the District Court's judgment on November 16, 1982.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the opinion of the United States Court of Appeals for the Fifth Circuit is contra to the law of double jeopardy as decided in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

ARGUMENT

The Court of Appeals Applied the Incorrect Standard of Review When It Held That Roberts Has a Substantial Double Jeopardy Claim Under the United States Supreme Court's Holding in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

Addressing the double jeopardy question, the District Court adopting the Magistrate's Report and Recommendation states:

> It is thus apparent that manslaughter by automobile in violation of § 97-3-47 cannot be proved without at the same time proving reckless driving in violation of § 63-3-1201, and that conduct of petitioner that constituted reckless driving—losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle—*is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction.* [Emphasis Added].

Petitioner would note to the Court that § 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this state and do not involve a wrongful homicide. The crime of manslaughter involves a wrongful homicide, an element altogether lacking in the traffic offenses.

Section 63-3-1201, Reckless Driving, requires that the vehicle be driven on the highways of this state before a citation can be issued. A motorist could not be given

a citation for driving recklessly in a private parking lot, however, that same motorist could be guilty of manslaughter under § 97-3-47 for the unintentional killing of someone in that private parking lot. It is clear that the two offenses are distinct both in law and fact. The traffic offenses are not lesser degrees of the crime of manslaughter.

As stated in Annot. 172 A.L.R. 1053 (1948), *Acquittal of One Offense in Connection With Operation of Automobile As Bar to Prosecution of Another.*

> . . . it should be borne in mind that there is a distinction between an offense and the unlawful act out of which it arises and that *the rule that a person shall not be twice put in jeopardy for the same offense is directed to the identity of the offense and not to the act.* [Emphasis Added].
>
> . . . where two offenses, committed in the operation of a motor vehicle, are separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other, even though both offenses were committed at the same time and by the same act.

The Court in *Bacom v. Sullivan*, 200 F.2d 70 (5 Cir 1952), *cert. denied*, 345 U.S. 910, 73 S.Ct. 651, 97 L.Ed. 1345 (1953) stated:

> To constitute double jeopardy, it is not enough that the second prosecution arises out of the same facts as the first. It must be for the same 'offense.' The same act may constitute an offense against two separate statutes. The recognized test for determining the identity or separateness of offenses charged in two indictments is whether or not the same proof will sustain a conviction under both or whether one requires

proof of facts, not required by the other. *Chrysler v. Zerbst*, 10 Cir., 81 F.2d 975; *McGinley v. Hudspeth*, 10 Cir., 120 F.2d 523.

If one statute requires proof of a fact which the other statute does not, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other as double jeopardy. *Graveires v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489; *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500; *Sims v. Rives*, 66 App. D.C. 24, 84 F.2d 871, *cert. denied*, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402. In the latter case, quoting from *Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153, it was aptly said '* * * the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.' [66 App. D.C. 24, 84 F.2d 876].

In *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (Miss. 1941) the Supreme Court of Mississippi stated:

> The driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor. § 49, Ch. 200, Laws 1938. The driving of an automobile while in this condition is therefore per se negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106. But this does not mean that such evidence constitutes a prima facie case of manslaughter. (citations omitted) It must be kept in mind that appellant is here prosecuted not for driving while under the influence of intoxicating liquor but for culpable negligence. These are separate offenses for which one could be separately prosecuted and neither prosecution would bar the other. See *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274; *People v. Townsend*, 214 Mich. 267, 783 N.W. 177, 16 A.L.R. 902,

8 R.C.L. 147; *Holland v. State*, 123 Fla. 142, 166 So. 468. In a prosecution for manslaughter referable to culpable negligence, intoxication could be a relevant evidential fact. Yet it is not as controlling that the defendant in manslaughter was violating the traffic laws as that he was in fact culpably negligent. One may be negligent while acting lawfully. *State v. Brewen*, 169 Iowa 256, 151 N.W. 102; *Commonwealth v. Amatucci*, 29 Del. Co. R., Pa., 160. One may violate the law and yet not be culpably negligent in fact. *Commonwealth v. Aurick*, 138 Pa. Super. 180, 10 A.2d 22; *People v. Warner*, 27 Cal. App. 2d 190, 80 P.2d 737; *Commonwealth v. Williams*, 133 Pa. Super. 104, 1 A.2d 812. It is sufficient in a prosecution for the misdemeanor that the defendant be driving while under the influence of liquor. No injury need be shown.

The Supreme Court of Iowa addressed the same issues as are now before this Court in a very similar case. Also in that case the United States Supreme Court refused to hear petitioner's appeal. That case was *State v. Stewart*, 223 N.W.2d 250 (1974), *cert. denied*, 423 U.S. 902, 96 S.Ct. 204, 46 L.Ed.2d 134. In that case the Court held that defendant's reckless driving conviction which arose out of the same occurrence was not a lesser included offense of manslaughter and former jeopardy did not bar defendant's conviction of manslaughter.

In *State v. Stewart, supra*, the Court stated:

> There are two steps in determining whether one offense is included within another. The first is a consideration of the elements. The lesser offense must be composed solely of some but not all elements of the greater crime. *The lesser crime must not require any additional element which is not needed to constitute*

the greater crime. The lesser offense is therefore said to be necessarily included within the greater. [Emphasis Added].

It is only after the elements of the lesser crime are shown to be necessarily included in the greater crime that a second inquiry is made. The second inquiry is a factual one, undertaken on a case by case basis. . . . *the lesser crime (reckless driving) requires additional elements not needed to constitute the greater crime (manslaughter)*. [Emphasis Added].

There are three elements to the crime of reckless driving under § 321-283, The Code. They are (1) the conscious and intentional operation of a motor vehicle (2) in a manner which creates an unreasonable risk or harm to others (3) where such risk is or should be known to the driver. *State v. Baker*, 203 N.W.2d 795, (796) (Iowa) and authorities.

Manslaughter under § 690-10, The Code, is the unlawful unintentional killing of a human being by another without malice express or implied. *State v. Boston*, 233 Iowa 1249, 1255, 11 N.W.2d 407, 410. We have no vehicular homicide statute in Iowa. But our cases acknowledge manslaughter can be committed by operating a motor vehicle in either of two ways. Manslaughter may result from the reckless operation of a motor vehicle. *State v. Wallin*, 195 N.W.2d 95, 99 (Iowa 1972); *State v. Means*, 211 N.W.2d 283 (Iowa 1973). It may result from operating a motor vehicle while intoxicated. *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

However under either theory, proof of manslaughter requires proof of fact (resultant death) which the other (either reckless driving or driving while in-

toxicated) does not. See *State v. Cook, supra*, and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309.

223 N.W.2d at 253:

> We think that reckless driving and manslaughter are not the same for former jeopardy purposes. We approve the following:
>
> 'The offense of reckless driving is not the same in law or in fact as, nor is it a lesser degree of, the offense of manslaughter arising out of the operation of a motor vehicle, even though they may arise from the same occurrence or transaction, and consequently an acquittal or conviction of reckless driving will not be a bar to a prosecution for manslaughter arising out of the same facts. Nor will an acquittal or conviction of manslaughter serve as a bar to a prosecution for reckless driving arising out of the same facts does not bar a subsequent prosecution for causing the death of another by reckless driving, the offense not being the same.' 7 Am.Jur.2d, Automobiles and Highway Traffic, § 343, pages 889-890. See also 22 C.J.S. Criminal Law 8 295(2), pages 771-772.
>
> We conclude defendant is wrong in claiming reckless driving is a lesser included offense to manslaughter.

The District Court adopting the Magistrate's Report states that guidance of respondent's contention, that he is entitled to habeas relief on the ground that trial on the manslaughter charge after trial and conviction of the misdemeanors violated his rights under the Double Jeopardy Clause of the Fifth Amendment, may be found in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980). The Supreme Court in *Illinois v. Vitale*, held:

The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a reckless failure to reduce speed and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Of course, any collision between two automobiles or between an automobile and a person involves a moving automobile and in that sense a 'failure' to slow sufficiently to avoid the accident. But such a 'failure' may not be reckless or even careless, if when the danger arose, slowing as much as reasonably possible would not alone have avoided the accident yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the Blockburger test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.* [Emphasis Added]. (65 L.Ed.2d at 237).

The Court in *State v. James,* 606 P.2d 1101 (N.M. App. 1979), found that the municipal court record did not show a plea of guilty or a trial to determine guilt or innocence on the traffic offense charge, the Court held

that such circumstances did not rise to the level of a conviction for purposes of double jeopardy. It was then further held:

> We also reassert the jurisdictional exception to using a lesser included offense as a bar to prosecution of the greater offense. The exception was set forth in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262, 263 (1950), where the court quoted the following language from 1 F.Wharton, Criminal Law § 394 (12th ed.):
>
> 'And a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and vice versa. But a former trial and acquittal or prosecution, unless the defendant could have been convicted on the same evidence in the former trial, of the offense charged in the subsequent trial. An acquittal or confiction for a minor offense included in a greater offense will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.'

The exception was recognized in the specially concurring opinion of Justice Sosa in *State v. Tanton*, 88 N.M. 333, 337, 540 P.2d 813, 817 (1975):

> I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge.

The exception does not conflict with the United States Supreme Court decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). The Waller

decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule. *Id.* at 395, n. 6, 90 S.Ct. 1184. In *Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Mr. Justice Brennan specified and elaborated upon several of the exceptions in his concurring opinion. He stated: 'Another exception would be necessary if no single court has jurisdiction of all the alleged crimes.' *Id.* at 453, n. 7, 90 S.Ct. at 1199, n. 7.

It is clear that the justice court in the case presently before this Court was acting pursuant to its authority to punish Respondent for his traffic infractions, but it is equally clear that it had no authority to prosecute for manslaughter. Consequently, under the jurisdictional exception the State's felony prosecution against Respondent was correct.

The Court in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) stated:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932):
>
> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, *the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not* . . . [Emphasis Added].

In the recent case of *United States v. Cowart*, 595 F.2d 1023 (5 Cir. 1979), the same issue was addressed in this language:

> This standard frequently has been referred to as the 'same evidence' test; however, the *Blockburger test looks not to the evidence adduced at trial but focuses on the elements of the offense charged. Brown v. Ohio*, 432 U.S. at 166, 97 S.Ct. at 2225 (Blockburger test emphasizes the elements of the two crimes); *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ('if each [offense] requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.') *United States v. Dunbar*, 591 F.2d 1190, 1193 (5th Cir. 1979) ('Application of the [Blockburger] test focuses on the statutory elements of the offenses charged.') [Emphasis Added]. (595 F.2d at 1023).

Similarly, it was held in *Walker v. Loggins*, 608 F.2d 731 (9 Cir. 1979):

> The application of this test focuses on the statutory elements of the offense charged, not the particular manner in which the offense was committed or described in the indictment. *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

An examination of statutory offenses here involved reveals that each contains elements not common to the other. The offenses of reckless driving, driving while license suspended or revoked, driving on wrong side of road, driving under the influence, are predicated upon

the manner of operation of a motor vehicle upon the streets or highways of this State and are in no manner dependent upon any resultant injury to persons or property. See *Barnes v. State*, 249 Miss. 482, 162 So.2d 865 (1964); *Gause v. State*, 203 Miss. 377, 34 So.2d 729 (1948); *Sanford v. State*, 195 Miss. 896, 16 So.2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide, but is not restricted as to either instrumentality or location. *Gandy v. State*, 373 So.2d 1042 (1979). See also: *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941). These offenses therefore are neither the same in law or fact.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Larry M. Wilson, a Special Attorney General for the State of Mississippi and one of the attorneys for the Petitioners, do hereby certify that I have this day served a true and correct copy of the foregoing Writ of Certiorari to the following counsel:

Cleve McDowell, Esq.
Attorney at Law
Post Office Box 1205
Cleveland, Mississippi 38732

This, the 7th day of February, 1983.

LARRY M. WILSON

APPENDIX

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner

v.

MORRIS THIGPEN, ET AL,
Defendants

REPORT AND RECOMMENDATION

In this petition for a writ of habeas corpus, petitioner Barry Joe Roberts challenges the constitutionality of his May 15, 1978 manslaughter conviction in the Circuit Court of Tallahatchie County, pursuant to which he is presently incarcerated at the Mississippi State Penitentiary.

Petitioner's trial and conviction on the manslaughter charge resulted from a tragic collision on August 6, 1977 between an automobile driven by petitioner and a pickup truck, in which collision the ten-year-old daughter of the driver of the truck was killed. Shortly after the accident, petitioner was cited by a Mississippi Highway Patrolman for several misdemeanor offenses, viz., driving under the influence, driving on the wrong side of the road, driving with a suspended license, and reckless driving. On August

13, 1977, petitioner was tried and convicted of these charges by a Tallahatchie County Justice of the Peace; on the same date, petitioner appealed the convictions to the Circuit Court of Tallahatchie County pursuant to Miss. Code Ann. §99-35-1, where he was entitled to trial de novo, id. Before the misdemeanor charges were retried on appeal, petitioner was indicted by the Tallahatchie County Grand Jury for manslaughter of the child killed in the traffic collision. Trial of the appeal of the misdemeanors thereafter was consolidated with trial of the manslaughter charge, but the misdemeanor appeals were nolle prossed during the consolidated trial.

Petitioner claims that he is entitled to habeas relief on the ground that trial on the manslaughter charge after trial and conviction of the misdemeanors violated his rights under the Double Jeopardy Clause of the Fifth Amendment.[1] Guidance on this contention is found in Illinois v. Vitale, ... U.S. ....., 65 L.Ed.2d 228 (1981). There, in a similar factual setting, the Supreme Court held that the Double Jeopardy Clause precludes prosecution for manslaughter by automobile when the defendant has been convicted of a misdemeanor based on the same conduct and where proof of the manslaughter charge necessarily entails proof of the misdemeanor charge.

As noted above, one of the misdemeanors of which petitioner was convicted was reckless driving. Miss. Code Ann. §63-3-1201 provides that "Any person who drives any vehicle in such a manner as to indicate a wilful or wanton disregard for safety of persons or property is guilty of

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1. Petitioner also asserts claims for habeas relief based upon the trial court's certification of an improper special venire, and ineffective assistance of counsel. Because of the court's disposition of the petition on other grounds, it is unnecessary to address these claims.

reckless driving." Manslaughter is defined in general terms by Miss. Code Ann. §97-3-47 as "killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law . . ."; with regard to manslaughter by automobile, the Mississippi Supreme Court has construed the statute to explain that "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life", Smith v. State, 20 So.2d 701, 704 (Miss. 1945), "that is to say, a wanton and flagrant recklessness and disregard of the safety of human life or limb . . .", *id.* at 706. It is thus apparent that manslaughter by automobile in violation of §97-3-47 cannot be proved without at the same time proving reckless driving in violation of §63-3-1201, and that the conduct of petitioner that constituted reckless driving — losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle — is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction. Therefore, under the Double Jeopardy Clause, the "conviction on [the] lesser included offense bars subsequent trial on the greater offense", Illinois v. Vitale, *supra*, 65 L.Ed.2d at 238, and petitioner is entitled to habeas relief on his double jeopardy claim.

Additionally, prosecution of petitioner on the manslaughter charge violated his right to due process of law under the Fourteenth Amendment. Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628 (1974), established a per se rule that a criminal defendant's right to due process is violated by the state substituting a felony charge for a misdemeanor charge covering the same conduct after the defendant has been convicted of the misdemeanor and has exercised his right under state law to appeal and to

trial de novo. The facts of this case fall squarely within *Blackledge*, under which petitioner also is entitled to relief.

For the foregoing reasons, it is recommended that the petition be granted, that the challenged manslaughter conviction be set aside, and that respondent be ordered to release petitioner from custody forthwith.

Respectfully submitted, this 3rd day of November, 1981.

/s/ (Illegible)
United States Magistrate

EXHIBIT 2

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner

v.

MORRIS THIGPEN, ET AL,
Defendants

ORDER

Upon due consideration of the petition for a writ of habeas corpus filed herein, the response thereto, and the Report and Recommendation of the United States Magistrate entered herein on November 3, 1981, no objection thereto having been filed, the court finds that the petition is well taken and should be granted. It is therefore

ORDERED:

1. That the Report and Recommendation of the United States Magistrate is hereby adopted as the opinion of the court; and

2. That the petition for a writ of habeas corpus is hereby granted, that petitioner's May 15, 1978 manslaughter conviction in the Circuit Court of Tallahatchie County is hereby vacated, and that respondent shall forthwith release petitioner from custody.

This, 19th day of November, 1981.

/s/ L. T. Senter, Jr.
United States District Judge

EXHIBIT 3

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, et al.,
Defendants.

ORDER

On November 23, 1981, this court issued an order staying its November 19, 1981, grant of habeas corpus so that defendants' counsel might have the opportunity to file written objections to the report and recommendations of the magistrate filed November 3, 1981. After reviewing defendants' objections and the brief filed by petitioner in support of the magistrate's report and recommendations, the court is of the opinion that the facts of this case fall squarely within *Blackledge v. Perry*, 417 U.S. 21 (1974), and that the writ earlier granted should issue.

Accordingly, it is

ORDERED:

That the stay ordered on November 23, 1981, is hereby lifted.

This 18th day of January, 1982.

/s/ L. T. Senter, Jr.
United States District Judge

EXHIBIT 4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4067

BARRY JOE ROBERTS,
Petitioner-Appellee,

versus

MORRIS THIGPEN, Commissioner, Mississippi Department of Corrections, ET AL.,
Respondents-Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi

(NOVEMBER 16, 1982)

Before RUBIN and JOHNSON, Circuit Judges, and DAVIS,* District Judge.

PER CURIAM:

This habeas corpus appeal comes before this Court in an unusual manner: it is the state, not the prisoner, that appeals. Roberts was tried and convicted in a Tallahatchie County Justice Court for the misdemeanor offense of reckless driving;[1] he was later convicted of manslaughter in the Circuit Court of Tallahatchie County. Roberts challenged his manslaughter conviction on the

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*District Judge of the Western District of Louisiana, sitting by designation.

1. Roberts was also convicted of three other misdemeanor offenses: driving under the influence of intoxicating liquor, driving on the wrong side of the road, and driving with a suspended license.

grounds that he was twice put in jeopardy for the same offense. The federal district court held that Roberts was entitled to habeas corpus relief on either double jeopardy or due process grounds.[2] We agree with the district court that Roberts was twice put in jeopardy for the same offense and therefore affirm the granting of habeas corpus relief.

I.

On August 6, 1977, at approximately 7:00 p.m., Roberts lost control of his car and collided with a pickup truck on Mississippi State Highway 35. The ten-year-old daughter of the driver of the pickup truck was killed. Roberts was tried and convicted by a Tallahatchie County Justice Court judge for the misdemeanor offense of reckless driving and three other misdemeanor offenses. Roberts' punishment was assessed at a fine of $100.00 for the offense of reckless driving. He appealed his convictions to the Tallahatchie Circuit Court where he was entitled to trial de novo. Before he was retried for the misdemeanor charges on appeal, Roberts was indicted for the felony offense of manslaughter of the girl killed in the collision. The appeal of the misdemeanors was consolidated with the manslaughter trial, but the misdemeanor appeals were "nolle prossed."[3] Roberts was convicted of manslaughter on May 15, 1978, after a trial by jury, and sentenced

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2. The district court found that a violation of due process constituted an alternative basis for habeas corpus relief. In so finding, the court relied on Blackledge v. Perry, 94 S.Ct. 2098 (1974), for the proposition that the state may not substitute a felony charge for a misdemeanor charge which covers the same conduct after the defendant has been convicted of the misdemeanor and has exercised his right under state law to appeal and to trial de novo. Because we find Roberts' manslaughter conviction barred by the double jeopardy clause, we do not reach the *Blackledge* ground for the court's holding.

3. The prosecutor declared he would not prosecute.

to twenty years in the Mississippi Department of Corrections.

On March 13, 1981, Roberts filed a habeas corpus petition in federal district court. Roberts contended that he was put in double jeopardy in violation of the fifth amendment because the same proof was offered to sustain the conviction of involuntary manslaughter that had been offered to prove the misdemeanor charges. The district court's granting of habeas corpus relief on the double jeopardy claim was based on the Supreme Court's decision in *Illinois v. Vitale*, 100 S.Ct. 2260 (1980). The district court concluded that manslaughter by automobile cannot be proved without at the same time proving reckless driving, and consequently, reckless driving is a lesser included offense of manslaughter. The felony manslaughter trial and conviction was therefore held to be barred due to the prior misdemeanor conviction for reckless driving.

II.

A.

One of the guarantees of the constitutional prohibition of double jeopardy is protection against a second prosecution for the same offense after conviction.[4] We must decide, therefore, whether the felony offense of manslaughter is the "same offense" for double jeopardy purposes as the misdemeanor offense of reckless driving.

In confronting this question, this Court is bound by the analytical framework of *Vitale*. The *Vitale* analysis is a two-pronged one. The first prong involves application

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4. The other two guarantees are (1) protection against a second prosecution for the same offense after acquittal and (2) protection against multiple punishment for the same offense. Illinois v. Vitale, 100 S.Ct. 2260, 2264-65.

of the *Blockburger test.*[5] The Supreme Court's application of the test focuses on the statutory elements of each offense. *Ianelli v. United States,* 95 S.Ct. 1284, 1293 n.17 (1975).

In this case the *Blockburger* test requires a close comparison of the Mississippi statute for reckless driving and the Mississippi manslaughter statute. Miss. Code Ann. § 63-3-1201 provides that "[a]ny person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving." Miss. Code Ann. § 97-3-47 defines manslaughter in general terms as the "killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law . . . ." To establish a violation of the reckless driving statute, one element not required to prove manslaughter must be established: operation of a motor vehicle. Of course, to establish manslaughter, an element not required to prove reckless driving must be shown: death of a person.

Brown v. Ohio, 97 S.Ct. 2221 (1977), and *Vitale* require a double checking of the analysis with a second question: does proof of the greater crime necessarily involve proof of the lesser crime? If, in proving manslaughter, the prosecutor has necessarily established reckless driving as well, double jeopardy will bar reprosecution.

A narrow focus on the two statutes provides one answer. Proof of manslaughter does not necessarily entail proof of reckless driving, for manslaughter could be proved

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5. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Brown v. Ohio, 97 S.Ct. 221, 225 (1977), *citing* Blockburger v. United States, 52 S.Ct. 180, 182 (1932).

in a situation completely foreign to a vehicular collision. The flaw in this analysis is that Mississippi has a case law veneer on its general manslaughter statute. Consequently, there is a definition, albeit not a statutory one, of the offense of vehicular homicide. The Mississippi Supreme Court has clearly defined the offense of manslaughter by automobile: "[T]he gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence which must be wanton or reckless under circumstances implying danger to human life." *Smith v. State*, 20 So.2d 701, 704 (Miss. 1945). By taking this judicial veneer into account, it is apparent that manslaughter by automobile cannot be proven without at the same time proving reckless driving. Because the specific felony offense, manslaughter by automobile, is not statutorily defined, this Court is confronted with a novel situation.[6] Depending on whether the focus is on the manslaughter statute alone or on its case law veneer as well, application of the first prong of the *Vitale* analysis gives different results.

B.

It is unnecessary to resolve this dilemma on the first prong of the analysis.[7] Roberts unquestionably has such

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6. In prior cases the two offenses, in question have been specifically defined by distinct statutes. For example in *Illinois v. Vitale*, both the traffic offense of failure to reduce speed and the felony offense of involuntary manslaughter by motor vehicle were statutory. (Although Illinois did not have a separate statute for manslaughter by automobile, the latter offense was incorporated into the manslaughter statute by specific reference in Section b of Ill. Rev. Stat. 1973, ch. 38, § 9-3.) In *Brown v. Ohio*, two specific statutes were involved—joyriding and auto theft.

7. This Court recognizes that the normal order of analysis would entail discussion of the second prong only if resolution of the first prong resulted in a finding that reckless driving is not always an essential element of the crime of manslaughter.

a "substantial claim" of double jeopardy under the second prong that his trial and conviction for manslaughter are precluded.

The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter, Roberts has a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Robert's conviction on the misdemeanor charge was also introduced in the manslaughter trial.[8] The trial court's instructions to the jury[9] leave

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8. This evidence consisted largely of the testimony of the investigating highway patrol officer regarding the speed of the car, tire skid marks, and the positions of the automobile and the pickup truck. The same highway patrol officer was the principal law enforcement witness in both proceedings.

9. The following portion of the court's charge is instructive:

> The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.
>
> If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that
>
> (a) The deceased, BRENDA BONNER, was a living person; and
>
> (b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle operated by the Defendant, then you should find the Defendant guilty of Manslaughter.
>
> If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of

(Continued on following page)

no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter.

III.

Because Roberts has a substantial double jeopardy claim under the Supreme Court's holding in *Illinois v. Vitale*, the district court's granting of habeas corpus relief must be affirmed.

AFFIRMED.

Footnote continued—

every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty.

Culpable negligence is, as used in these instructions, conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.